

THE VALIDITY OF CONSENT IN RELIGIOUS AND CUSTOMARY MARITAL DISPUTE RESOLUTION- A CASE STUDY OF ETHIOPIA

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1.0 INTRODUCTION

The constitution of the federal democratic republic of Ethiopia allows customary and religious courts to adjudicate cases related to family and personal matters (when all parties consent to it). While this pluralistic approach presents alternative ways of solving marital disputes, it brings along with it a danger to societies with low level education and low access to information. This is specially concerning since once someone agrees (consents) to settle their matter in this alternative methods the decision is binding and the person can not take their case to the formal court anymore.¹³⁴ While article 34(5) of the constitution makes consent a precondition for religious and customary laws to handle cases related to family and personal matters the legitimacy of the consent given by people with low access to legal information can be put to question. In order for consent to be valid it needs to be done with the person having full information on the issue they are making a decision on. The application of religious and customary laws to resolve marital disputes, particularly when consenting parties lack sufficient legal information undermines the validity of the given consent. This article aims to critically analyze the detrimental effects of allowing customary and religious laws to resolve marital disputes in light of the validity of the consent.

2.0 ACCESS TO LEGAL INFORMATION AND THE QUESTION OF CONSENT

Article 34 of the FDRE constitution allows the adjudication of disputes relating to personal and family matters in accordance with religious or customary laws with the consent of the parties to the dispute. Allowing consenting parties to settle marital disputes through customary or religious laws they are well accustomed to might seem appealing. However customary and religious alternatives are predominantly used in the rural areas of the country, an area with low access to information and education. This is due to a number of reasons such as convenience, cost, availability and the proximity of the religious and customary institutions. These systems are intertwined with society the disputing parties are part of. The parties of the disputes are also

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¹³⁴ Proclamation No 188/1999 Consolidating Federal Sharia Courts, passed by the HPR on 7 December 1999, art 5(4)

in some cases pressured to settle their disputes using the alternative methods as going to the formal legal system can be seen as transgressing the way of settling things with religious elders neighbors or elders of the community resolving and ruling over disputes within that society. The constitution seems to attempt to give people the right to choose which idea of justice applies to their cases. The formal legal system like most modern legal systems focuses on the individuals and some sort of punishment is imposed on the person judged to be the wrongdoer. The religious and customary laws on the contrary focus on reconciliation and restoring peace between disputants. These customary and religious laws sometimes go against the human rights protected by the constitution. The principles of equality the FDRE constitution and international laws upholds are ignored in some of these laws and gender insensitive customary and religious laws can still be used to resolve marital disputes as long as the parties consent to it.¹³⁵

As previously said these customary and religious laws are mostly used in rural areas. Most rural areas of Ethiopia have low access to information due to infrastructural and educational limitations. Their access to information regarding legal matters is even less. According to a 2020 study done by Hague institute for innovation of law, only 1% of legal advice is provided by lawyers. Ethiopians most often receive advice on legal matters from the people around them like family members, friends and community elders. Using public sources such as the radio, television or the internet is more common than seeking personalized advice from legal practitioners and formal institutions.¹³⁶

The constitution makes consent a precondition for religious and customary laws to apply to cases of marital disputes. One of the key elements of justice is informed consent. In a country with low level education and access to information people that choose to settle their marital disputes using religious and customary laws might not fully comprehend their rights or the consequences of selecting one over the other. In these instances where consent isn't given when having full information of what that choice will entail, clear understanding of the choices and assistance and availability of formal legal practitioners and some education on formal legal system the legitimacy of the given consent can be questioned. Many people might not be aware of the legal

¹³⁵ Muradu Abdo and Gebreyesus Abegaz, *Customary Law Teaching Material* (Justice and Legal System Research Institute 2009) 184-185

¹³⁶ Hague Institute for Innovation of Law, *Justice Needs and Satisfaction in Ethiopia 2020* (2020) 119-129

protection that comes with choosing the formal law in the consent might be motivated more by ignorance than a true preference of customary and religious systems.

3.0 RELIGION& CUSTOMARY LAWS, HUMAN RIGHTS AND GENDER INSENSITIVITY

Most customary and religious laws reflect patriarchal set up which can disadvantage women seeking the link Marshall disputes. In many of these cases women are seen as subordinate to man which perpetuates gender inequality. The laws administered by community elders aiming to resolve disputes will be done in ways that align with this cultural perception of society towards women. While customary laws provide culturally relevant means of dispute resolution, they usually lead to conflicts with the human rights protected by the constitution. In many customary and religious laws a common theme is the laws reflecting gender insensitive interpretations. The patriarchal system and the view towards women leads to instances where upon divorce, women are not given equitable property rights and their economic dependency on men is reinforced. Domestic violence is mostly justified and normalized in most customs. The dispute resolution systems that step in are usually inadequate often emphasizing reconciliation rather than the protection and safety of women.¹³⁷ This can discourage women from reporting abuse and seeking justice. According to a research conducted by village elders, family members indirect negotiations are the most often used dispute resolution mechanisms by women in Ethiopia. Women from rural areas with no education and with low income very often take their problems to village elders.¹³⁸ Due to limited infrastructure and education there is a great chance these women are not aware of the advantage the former legal system offers. It is the responsibility of the government to protect these women. The government must provide legal information, practitioners who can consult the people before they decide which routes they would like to take their cases. The government needs to take steps to ensure the consents given for adjudication of marital disputes are genuine and without coercion based on full information on the choices and the possible outcomes of the court they choose. The government needs to make sure the human rights of citizens being violated due to their position leading them to make uniformed consent.

¹³⁷ Muradu Abdo and Gebreyesus Abegaz, Customary Law Teaching Material (Justice and Legal System Research Institute 2009) 189

¹³⁸ Justice Needs and Satisfaction in Ethiopia 2020 by Hageu institute for innovation of law A research paper by Pages 133-153

4.0 CONCLUSION

While the constitution allows adjudication of marital disputes by religious and customary laws when the party to the dispute consent to it, it poses a risk when the consent is given by people who lack access to information in order to make informed valid consents. This can lead to gender insensitive laws being applied to their cases when they aren't fully aware of alternative choices they have that can lead to a different outcome. The groups that are most vulnerable to this are rural societies with low access to education, information, formal legal institutions and practitioners to consult. The government has the duty to protect these groups and to provide better access to information and ensure the consents given are legitimate before they are bound based on questionable consent. The application of customary and religious laws in resolving marital disputes particularly when consenting parties lack sufficient information undermines the validity of a consent given. Having customary and religious courts apply laws which are closer to the people and provide the idea of justice a parties prefer is beneficial to the parties and the evolving Ethiopian legal system. However the consent of the parties needs to be genuine and well informed it should not be due to pressure from society, lack of access to information or access to formal legal institutions. The consent failing to be legitimate will be an implication of the government failing to protect its people and their human rights as these customary and religious laws can violate fundamental human rights principles. To ensure the honest and true consent of the people the government should work towards providing access to information and education in rural areas. This can be done besides the formal education, television and radio programs that discuss the basic rights of people in different areas of the law. Building better infrastructure that would improve transportation and telecommunication can help those societies have better exposure and reach. Legal institutions and practitioners should be available and form close relationship with people in those societies and educate them on their legal rights. These institutions should not be alien and should be well integrated like the religious and customary institutions are.. To sum up consent which is a prerequisite for adjudication of marital disputes needs to be fully informed to make it full and legitimate. The people should have access to education and information to protect the fundamental rights of people from being violated.